IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Michael R. Smolenski, Presiding Judge

AUTO-OWNERS INSURANCE COMPANY
Plaintiff-Appellee,

v

Docket No. 119410

AMOCO PRODUCTION COMPANY
Defendant-Appellant.
_____/

REPLY BRIEF ON APPEAL - APPELLANT

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STATEMENT OF QUESTION PRESENTED

I

WHETHER THE WORKERS' DISABILITY COMPENSATION ACT OF 1969, MCL 418.101; MSA 17.237(101), et seq., ALLOWS FOR INTEREST ON THE AMOUNT OF MONEY REIMBURSING PREVIOUSLY PAID MEDICAL CARE PROVIDED TO AN EMPLOYEE WHO WAS INJURED BECAUSE OF WORK.

Plaintiff-appellee Auto-Owners Ins Co answers "Yes."

Defendant-appellant Amoco Production Co answers "No."

Court of Appeals answered "Yes."

Workers' Compensation Appellate Comm answered "Yes."

Board of Magistrates answered "Yes."

STATEMENT OF FACTS

Leroy Smithingell (Employee) was absent from work between January 30 and May 16, 1994 (12a) and received medical care (10a, 11a) because of an injury to the left hand and back (10a) when knocked against an enclosed bulletin board on a wall (8a, 9a) by a truck left running in the garage at defendant-appellant Amoco Production Company (Employer). (8a) During this absence, the Employer continued to pay the salary of the Employee (13a)[1] and Metropolitan Life Insurance Company (Group Carrier) paid some of the expenses of medical care. (17a) Plaintiff-appellee Auto-Owners Insurance Company (Auto "No-Fault" Carrier) paid the Employee wage loss benefits[2] and paid for other medical care[3] because of the insurance the Employee obtained. (14a)

The Auto "No-Fault" Carrier then filed an application for mediation or hearing with the Bureau of Workers' Disability Compensation (Bureau) for repayment of the wage loss and medical expenses paid to the Employee from the Employer. (1a, 3a) The Employee did not seek or receive any workers' disability compensation.

The Board of Magistrates (Board) denied the claim for repayment of weekly compensation but allowed reimbursement for the costs of the medical care paid by the Auto "No-Fault" Carrier subject to cost containment and with ten percent interest. *Auto Owners Ins Co v Amoco Corp*, unpublished order and opinion of the Board of Magistrates, decided on May 30, 1995 (Docket no. 053095003). (18a, 22a)

The Workers' Compensation Appellate Commission (Commission) affirmed. *Smithingell v Amoco Production Co*, 1998 Mich ACO 1117. (23a, 26a-28a)

The Court of Appeals remanded the case to the Commission for reconsideration in light of *Perez v State Farm Mutual Automobile Ins Co*, 418 Mich 634,

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[1] $787.00. (7a)

[2] $669.29 weekly (16a) for sixteen weeks (15a) totaling $10,708.64. (15a)

[3] Totaling $9,636.64. (15a)

650; 344 NW2d 773 (1984), *Luth v Automobile Inter Ins Exchange*, 113 Mich App 289, 294; 317 NW2d 867 (1982), lv den 417 Mich 867 (1983), and MCL 418.852(1); MSA 17.237(852)(1). *Auto Owners Ins Co v Amoco Production Co*, unpublished order of the Court of Appeals, decided on November 6, 1998 (Docket no. 211679). (29a)

The Commission affirmed on remand. *Smithingell v Amoco Production Co (On Remand)*, 1999 Mich ACO 348. (30a, 33a-34a)

The Court of Appeals again remanded the case to the Commission to determine whether the cost containment rules promulgated by the Bureau limit reimbursement and, if not, establish the amount of reimbursement of the medical costs paid by the Auto "No-Fault" Carrier. *Auto Owners Ins Co v Amoco Production Co (After Remand)*, unpublished order of the Court of Appeals, decided on May 25, 1999 (Docket no. 218310). (35a) In the same order, the Court of Appeals expunged a brief which the Auto "No-Fault" Carrier had filed after the application for leave to appeal declaring that " . . . [the Auto 'No-Fault' Carrier] wrong[ly] noted that the amount of medical benefits paid . . . was $9,636.64. The total amount of medical benefits paid . . . [was] $19,191.81." *Plaintiff-Appellant Auto Owners Insurance Company's Supplemental Brief in support of* ***Application for Leave to Appeal***, 1 (Docket no. 211679). (35a)

The Commission affirmed on second remand. *Smithingell v Amoco Production Co (On Second Remand)*, 1999 Mich ACO 2914. (36a, 39a)

The Court of Appeals then granted leave to appeal from the decision by the Commission on second remand, *Auto Owners Ins Co v Amoco Production Co (After Second Remand)*, unpublished order of the Court of Appeals, decided on April 7, 2000 (Docket no. 223572) (40a), affirmed, *Auto Owners Ins Co v Amoco Production Co*, 245 Mich App 171; 628 NW2d 51 (2001) (41a-45a) and then, denied rehearing. *Auto Owners Ins Co v Amoco Production Co*, unpublished order of the Court of Appeals, decided on May 17, 2001 (Docket no. 223572). (46a)

The Court granted leave to appeal which was requested by the Auto "No-Fault" Carrier and the Employer. *Auto-Owners Ins Co v Amoco Production Co*, 466 Mich 859; - NW2d - (2002). (47a, 48a)

ARGUMENT

I

THE COURT OUGHT NOT AVOID THE QUESTION OF *WHETHER THE WORKERS' DISABILITY COMPENSATION ACT OF 1969, MCL 418.101; MSA 17.237(101), et seq., ALLOWS FOR INTEREST ON THE AMOUNT OF MONEY REIMBURSING PREVIOUSLY PAID MEDICAL CARE PROVIDED TO AN EMPLOYEE WHO WAS INJURED BECAUSE OF WORK.*

"Red herring" is a colloquial term of rhetoric adopted from the practice of deliberately dragging a herring across the trace to divert the hounds in pursuit of a fox and extend the formal hunt. The classical term for this is *ignoratio elenchi* which is literally, ignorance of the conclusion.

This tactic of rhetoric is a fallacy. A red herring distracts the argument by avoiding the immediate and real question being pursued and presenting another question which appears to be valid but actually is not. It is present in the familiar retorts *You never said* and *It doesn't matter* used by a student who answers a rebuke from a teacher with "You only said that I was talking in class. You never said that I was cheating" or "It doesn't matter that I don't have my homework because there is an assembly in the auditorium now" and by a spouse who answers a complaint with "You only said to wash the dishes. You never said that I had to put them away" or "It doesn't matter that I'm late from work because the party was canceled." It is present in both of the arguments of the Auto "No-Fault" Carrier in the *Brief on Appeal - Appellee*. Instead of engaging in the immediate and real question which was propounded by the Employer in the *Brief on Appeal - Appellant* of *Whether the Workers' Disability Compensation Act of 1969, MCL 418.101; MSA 17.237(101), et seq., allows for interest on the amount of money reimbursing previously paid medical care*

provided to an employee who was injured because of work, the Auto "No-Fault" Carrier diverts the Court with other questions of whether this immediate question was preserved for review, *Brief on Appeal - Appellee*, Argument I, 3, which is only an argument of *You never said* and that the answer of the Court of Appeals to the immediate question was only a harmless error, *Brief on Appeal - Appellee*, Argument II, 7, which is only an argument of *It doesn't matter.*

The Court should not be distracted by the question from the Auto "No-Fault" Carrier that the Employer did not preserve the immediate question for review. First, no authority which allows review by the Court actually requires the preservation of the immediate question. The statute in the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101; MSA 17.237(101), et seq., which describes the authority of the Court to review a claim for workers' disability compensation which states that, "[t]he . . . supreme court shall have the power to review questions of law involved with any final order of the commission, if application is made by the aggrieved party within 30 days after the order by any method permissible under the Michigan court rules," MCL 418.861a(14); MSA 17.237(861a)(14), second sentence, certainly does not actually include a requirement that the question was preserved by presentation to and explicit ruling by the Commission. The rule in the Michigan Court Rules (MCR), MCR 1.101, et seq., which describes the authority of the Court to review a published opinion of the Court of Appeals states that, "[t]he application [for leave to appeal] must show that . . . in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals," MCR 7.302(B)(5), certainly does not expressly include a requirement that the question was preserved by presentation to and explicit ruling by the Court of Appeals.

Second, there is no reason to infer a requirement that a question must be preserved by a presentation and ruling by the Commission or the Court of Appeals.

Preservation of a question by presentation and ruling by the Commission is not implicit in section 861a(14), second sentence, because review by the Court of a question of law is de novo, *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401; 605 NW2d 300 (2000); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 732; 614 NW2d 607 (2000); *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 99-100; - NW2d - (2002), which obviates any deference to a ruling by the Commission and so, obviates any need for a ruling by the Commission. Preservation of a question by presentation and ruling by the Court of Appeals is not implicit in MCR 7.302(B)(5) because the standard of review of *clearly erroneous* is the same as the standard of review of *plain error* that applies to a question which was not preserved. *People v Carines*, 460 Mich 750, 762-764, 774; 597 NW2d 130 (1999). *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Also, the requirement of saving a question for review is not implicit in either section 861a(14), second sentence, or MCR 7.302(B)(5) because of the distinctive character shared by the Commission and Court of Appeals. The rule for preserving a question for later review requires that the party present the question to the trial court on the record. *Franklin Mining Co v Harris*, 24 Mich 115 (1871). *Detroit Advertiser & Tribune v City of Detroit*, 43 Mich 116; 5 NW 72 (1880). *Case v Beech Lanes, Inc*, 338 Mich 631; 62 NW2d 616 (1954). *Helmer v Peoples Comm Hosp Authority*, 161 Mich App 675; 411 NW2d 823 (1987). This precludes applying the rule for preserving a question here because the only trial court was the Board whose decision is not subject to review, *Mudel, supra*, 709, "[r]eview by the Court of Appeals and this Court begins with the [Commission] decision, not the [Board]." Moreover, the Commission and Court of Appeals are not courts of record as all trial courts such as the Board, circuit courts, district courts, municipal courts, and the Court of Claims and as the Court. There is no record of the proceedings conducted by the Commission and the recordings of the hearings conducted by the Court of Appeals are for the private

convenience of the court and are not part of the public record because a transcript is not available.

Third, the real and immediate question propounded by the Employer *was* presented to both the Commission and the Court of Appeals. When the case was last before the Commission, the Auto "No-Fault" Carrier actually requested "full reimbursement of medical benefits paid, not pursuant to the cost containment rules, *plus statutory interest*," *Brief of plaintiff-appellant Auto Owners to the Workers' Compensation Appellate Commission on second remand*, Relief, 17 (emphasis supplied) (Volume 2 50a) that was based on the argument that, "MCL 418.852 [MSA 17.237(852)] governs reimbursement between insurance carriers. MCL 418.852 [MSA 17.237(852)] provides as follows . . . that carrier or fund *shall be reimbursed by the liable party or parties with interest at 12% per annum*." *Brief of plaintiff-appellant Auto-Owners to the Workers' Compensation Appellate Commission on second remand*, Argument I, 15. (emphasis in the original) (Volume 2 49a) The Employer joined this by reporting to the Commission that section 852(2) did not apply and that no statute in the WDCA allowed for "statutory interest." *Brief of defendant-appellee Amoco to the Workers' Compensation Appellate Commission on second remand*, Argument IV, 7. (Volume 2 51a) These same arguments were presented to the Court of Appeals after the second remand. *Brief of plaintiff-appellant Auto Owners to the Court of Appeals after second remand*, Argument I, 16 (Volume 2 52a), and *Brief of defendant-appellee Amoco to the Court of Appeals after second remand*, Argument III, 18-19. (Volume 2 54a-55a)

Indeed, the Auto "No-Fault" Carrier has previously recognized that the immediate question had been presented to the Court of Appeals when opposing rehearing by stating that, "[t]he record in this case establishes that it was [the Auto "No-Fault" Carrier] who raised the issue that 12% interest should apply . . ." *Answer to motion for rehearing by*

Court of Appeals, 2. (Volume 2 59a) Certainly, this is not a case of counsel secreting some issue. Cf. *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995).

The Court should not stray because of the other red herring presented by the Auto "No-Fault" Carrier which is the idea that *It doesn't matter* implicit in the analysis that it does not matter that no statute in the WDCA applies to allow for interest because the Board had discretion to allow interest ancillary to equitable jurisdiction. In particular, the Auto "No-Fault" Carrier says that, "the award of interest . . . was equitable and . . . may be upheld on the ground that the [Board] reached the right result for the wrong reason." *Brief on Appeal - Appellee*, Argument II, 8.

This is a red herring because the decision which is before the Court is the published opinion of the Court of Appeals in *Auto Owners Ins Co v Amoco Production Co*, 245 Mich App 171; 628 NW2d 51 (2001) (41a-45a) reh den, unpublished order of the Court of Appeals, decided on May 17, 2001 (Docket no. 223572) (46a) and not the decision by the Board in *Auto-Owners Ins v Amoco Oil Co*, unpublished order and opinion of the Board of Magistrates, decided on May 30, 1995 (Docket no. 053095003). (18a, 19a-22a) *Mudel, supra*, 709. This is important because review is dedicated to whether the opinion of the Court of Appeals is *clearly erroneous* or *conflicts with another decision of the Court of Appeals*, MCR 7.302(B)(5), which the Auto "No-Fault" Carrier grudgingly recognizes by stating that, "*Brown v Eller Outdoor Advertising Co*, 139 Mich App 7; 360 NW2d 322 (1984) appears to be dispositive that [MCL 418.801(6); MSA 17.237(801)(6)] governs [sic allows] interest only on work loss benefits." *Brief on Appeal - Appellee*, Argument II, 8. The Court simply cannot apply the harmless error rule or its variant of the right result for the wrong reason because it is the *wrong reason* which will be followed by later tribunals. Simply put, when reviewing a published opinion of the Court of Appeals which carries full stare decisis value, the Court must be concerned with the result or disposition of the particular case for

the sake of the individual parties who are before it *and* the reasoning or the rule of law for the sake of all the persons who are not present but who will be subject to the rule of law.

The argument by the Auto "No-Fault" Carrier is also a red herring because the alternate ground for allowing interest on the amount of money reimbursing the costs of medical care is meritless. The statutes in the WDCA that allow the Board to hear and decide claims for workers' disability compensation, MCL 418.841(1); MSA 17.237(841)(1), first sentence, "[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable" and MCL 418.847(1); MSA 17.237(847)(1), first sentence, "[e]xcept as otherwise provided for under this act, upon the filing with the bureau by any party in interest of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, the case shall be set for mediation or hearing, as applicable" does not include a grant of equitable power. *Dation v Ford Motor Co*, 314 Mich 152; 22 NW2d 252 (1946). *Solakis v Roberts*, 395 Mich 13; 233 NW2d 1 (1975). The Court held in *Dation, supra*, 160, that,

> ". . . it was said by this court in *Michigan Mutual Liability Co.* v. *Baker*, 295 Mich. 237:
>
> 'While the department has jurisdiction to determine 'all questions' (2 Comp. Laws 1929, § 8455 [Stat. Ann. § 17.190]) arising under the compensation law, it must be borne in mind that it is an administrative tribunal only and not a court possessing general equitable and legal powers. *Mackin* v. *Detroit-Timkin Axle Co.*, 187 Mich. 8.'
>
> Reference in the statute cited to 'All questions arising under this act,' must be given an interpretation consistent with the powers vested in the department. It was unquestionably the intention of the legislature that the department in its factfinding capacity should pass on factual issues presented in proceedings brought under the workmen's compensation law. The limitations on the power of the department, under the section cited by defendant, are clearly indicated by the language above quoted from *Michigan Mutual Liability Co.* v. *Baker, supra,* cited with approval in *Stuart v. Spencer Coal Co.*, 307 Mich. 685."

In *Solakis, supra*, 20-21, the Court emphatically rejected allowing interest based on some equitable power of the Board,

> "[w]hen an employee's injury is within the scope of the act, workmen's compensation benefits are the exclusive remedy against the employer. MCLA 418.131; MSA 17.237(131); *Ladner v Vander Band*, 376 Mich 321, 325; 136 NW2d 916 (1965).
>
> In *Tews v C F Hanks Coal Co*, 267 Mich 466, 468-469; 255 NW 227, 228 (1934), this Court stated:
>
> 'The compensation act is in derogation of the common law and, therefore, its measure of relief may not be extended beyond its express terms; it is a legislative creation permitting no enlargement by principles of equity or common-law adaptations. It is arbitrary and where it speaks nothing can be added nor changed by judicial pronouncement. It imposes liability upon operatives under its provisions and measures exclusive relief in its own terms.'
>
> Thus, it was not by happenstance that this Court in *Wilson* grounded the interest recovery concept on a contract theory. Because interest in Michigan is statutory, plaintiffs' arguments sounding in equity are to no avail.
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> * * *
>
> . . . this Court has often stated that [the Board] is not a 'court' and 'is not possessed of judicial power'. *Modeen v Consumers Power Co*, 384 Mich 354, 360; 184 NW2d 197, 200 (1971)."

RELIEF

Wherefore, defendant-appellant Amoco Production Company prays that the Supreme Court reverse the opinion of the Court of Appeals.

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